90-289

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

F L AEROSPACE,
Petitioner,
v.
AETNA CASUALTY & SURETY CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

Of Counsel:
ALLEN KEZSBOM
ALAN V. GOLDMAN
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A partnership including professional corporations)
One New York Plaza
New York, New York 10004-1980
(212) 820-8000

WALLACE K. SAGENDORPH
Counsel of Record for Petitioner
SAGENDORPH AND MOORE, P.C.
5455 Corporate Drive, Suite 301
Troy, Michigan 48098-2620
(313) 641-1860

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

QUESTIONS PRESENTED

I.

WHETHER A CIRCUIT COURT OF APPEALS, WHEN EXERCISING ITS DIVERSITY JURISDICTION, MAY PREDICT A STATE SUPREME COURT RESULT CONTRARY TO DIRECTLY APPLICABLE, RECENT INTERMEDIATE STATE COURT PRECEDENT?

II.

WHETHER, SINCE A STATE SUPREME COURT HAS NOW AGREED TO HEAR THE SAME ISSUES DECIDED BY THE CIRCUIT COURT OF APPEALS, THIS COURT SHOULD ABSTAIN PENDING THE OUTCOME OF THE STATE SUPREME COURT PROCEEDINGS?

RULE 29.1 STATEMENT

The Parent Company of Petitioner F L Aerospace Corp is MRC Acquisition Corp, which is wholly owned by F L Aerospace Holdings Corp, all Delaware corporations.

F L Aerospace Corp owns no interest in any subsidiaries other than wholly owned subsidiaries.

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No. _____

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F L AEROSPACE,

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v.

AETNA CASUALTY & SURETY CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This case arises from a decision of the Court of Appeals for the Sixth Circuit that disregarded applicable Michigan appellate court precedent and thus violated this Court's decisional rule enunciated in *Erie Railroad Co.* v *Tompkins*, 304 US 64 (1938) and *West* v *AT&T Co.*, 311 US 223 (1940).

When this case was argued to the Sixth Circuit four separate decisions of the Michigan Court of Appeals[1]

[1] *Upjohn Co.* v *New Hampshire Insurance Co.*, 178 Mich App 706, 444 NW2d 813 (1989), *lv to appeal granted*, ___ Mich ___ (##86906-86908, July 13, 1990); *Protective National insurance Co.* v *City of Woodhaven*, No. 101968 (Mich Ct App Sept 28, 1988) (unpublished), *lv to appeal denied*, 432 Mich 927 (1989), *denial vacated and lv to appeal granted*, ___ Mich ___ (#85180, July 13, 1990); *Shue* v *D&B Brine, Inc.*, No. 92404 (Mich Ct App July 27, 1987) (unpublished); *Jonesville Products, Inc.* v *Transamerica Insurance Group*, 156 Mich App 508, 402 NW2d 46 (1986), *lv to appeal denied*, 428 Mich 897 (1987). *Polkow* v *Citizens Insurance Co. of America*, 180 Mich App 651, 447 NW2d 853 (1990), *lv to*

(concluded on page 2)

already held, consistent with the law in many other states, that the terms "sudden and accidental," as applied to environmental claims under a general liability insurance contract, are to be interpreted as having a non-temporal meaning (that is, as whether an event was "unexpected or unintended" by the insured). The Sixth Circuit found each one of these cases (and one other subsequent decision) flawed or inapplicable. The Court predicted that the Michigan Supreme Court would most likely disregard all its lower court precedents on the point and interpret the terms "sudden and accidental" as the Sixth Circuit had done in other cases and as having a purely temporal meaning, i.e., referring only to abrupt events such as explosions or spills.

The Court of Appeals for the Sixth Circuit made this prediction about Michigan law without the support of any "persuasive data" as required by *West* (see discussion *infra*). The Sixth Circuit provided no evidence that if the Michigan Supreme Court were to decide this issue today, it would determine to reverse all four panels of the Michigan Court of Appeals. The Sixth Circuit simply disagreed with the Michigan courts and supplied its own version of "general" law — just as if *Erie Railroad Co.* v *Tompkins, supra,* had never been decided. This unsupported prediction of Michigan law, contrary to recent lower court precedent, in itself constitutes a brazen disregard for *Erie* principles that this Court should not tolerate.

Moreover, less than two months after the Sixth Circuit's rash action the Michigan Supreme Court decided to hear several of the same Michigan cases the Sixth

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(*continued from page 1*)

appeal granted, __ Mich __ (#87617, July 13, 1990) was decided subsequent to the September 29, 1989 argument to this case. When the Sixth Circuit considered this case five Michigan Court of Appeals panels had interpreted "sudden and accidental" non-temporally.

Circuit had disregarded. On July 13, 1990 the Michigan Supreme Court granted applications for leave to appeal in three of the five Michigan Court of Appeals decisions[2] referred to here. The highest court of the State will now decide the meaning of "sudden and accidental" as used in general liability insurance policies. Thus, Petitioner asks that this Court abstain from any decision on this Petition until after the Michigan Supreme Court has spoken.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 897 F2d 214 (6th Cir 1990). The opinion of the United States District Court is unreported. The two opinions are reproduced in the appendix at pages A-2 and A-16, respectively.

JURISDICTION

The opinion of the Sixth Circuit was entered March 1, 1990. The order of the Sixth Circuit denying rehearing en banc was entered May 17, 1990. This Court's jurisdiction is invoked pursuant to 28 USC § 1254(1).

STATEMENT OF THE CASE

From 1973 to 1975, Petitioner's predecessor in interest, Midland-Ross Corporation, transported its industrial waste via a state-licensed hauler to a disposal

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[2] *Upjohn Co.* v *New Hampshire Insurance Co., supra; Polkow* v *Citizens Ins. Co. of America, supra;* and *Protective National Insurance Co.* v *City of Woodhaven, supra.*

site in Michigan owned and operated by a state-licensed firm, Berlin & Farro Liquid Incineration, Inc. Berlin & Farro operated the site until September of 1975, when it was shut down by Michigan regulatory authorities because of citizen complaints arising from, *inter alia*, spills, releases and incomplete combustion of industrial waste. Berlin & Farro ultimately was adjudicated a bankrupt and abandoned the site.

In 1983 the United States Environmental Protection Agency (USEPA) determined the site contained hazardous waste and placed it on the USEPA's "priority" list of contaminated sites for Superfund cleanup pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC §§ 9601-9675. The USEPA named Midland-Ross a "potentially responsible party" under CERCLA in September of 1983. Immediately thereafter Midland-Ross, together with scores of other "generators," was sued by a group of individuals who owned real property near the former disposal site. The defendants were accused of creating and maintaining a "nuisance" on the site which allegedly devalued plaintiff's property and endangered their health.

Midland-Ross had discussions with its insurance carriers, notably the sales agent for Respondent Aetna Casualty & Surety Company, in late 1983 regarding these legal proceedings in Michigan. No written notice of any claim was immediately filed. In March of 1984, upon the issuance of an administrative order by the USEPA pursuant to CERCLA § 106, 42 USC § 9606, Midland-Ross entered into a proposed settlement with the USEPA in which Midland-Ross agreed to pay a proportionate amount of the cost for the "Phase I" clean up of the Berlin & Farro site. Discussions between the USEPA and several of the generators regarding additional cleanup operations continued, and a "Phase II" Consent Decree was lodged in the Federal District

Court for the Eastern District of Michigan in February of 1986.

Formal written notice of the state court litigation was provided to Aetna in November of 1984. Formal written notice of the Phase I USEPA settlement and Phase II proceedings was given in June of 1985. To each of the state court suit notifications Aetna issued "reservation of rights" letters in January of 1985. Aetna issued a similar letter to the EPA notification in January of 1986. In all of these letters Aetna agreed to participate in the defense of the claims, subject to specific policy exemptions and exclusions. Aetna cited provisions of the comprehensive general liability policies it had issued to Midland-Ross during the 1973-1975 period the Berlin & Farro Incinerator was in operation, including the "sudden and accidental" pollution exclusion. Aetna did not, however, raise late notice or material prejudice as defenses against payment. Aetna investigated the claims, was kept informed of the progress of the state court litigation and the EPA Phase II investigation, and was informed of potential settlements.

Yet when the state court litigation was concluded Aetna failed to acknowledge or pay any of the claims. Suit was commenced in the state court against Aetna in February of 1987 for indemnity and defense costs arising from the state court claims, the Phase I USEPA settlement and the Phase II potential liability. Aetna denied any responsibility and raised a number of defenses for the first time, including late notice and material prejudice. Aetna removed the case to the federal district court for the Eastern District of Michigan solely on diversity of citizenship, and the case was tried to the court in August of 1988.

The trial court found that the property damage alleged by the state court plaintiffs and the USEPA was

an "occurrence" under the Aetna policy and that the cleanup costs were "damages" under Michigan law. The trial court also found that pursuant to Michigan law, namely a Michigan Court of Appeals' decision entitled *Jonesville Products Inc.* v *Transamerica Insurance Group*, 156 Mich App 508, 402 NW2d 46 (1986), *lv to appeal denied*, 428 Mich 897 (1987), that the insurance policy's "sudden and accidental" pollution exclusion does not apply if the discharges were "unexpected" and "unintended" from the standpoint of the insured.[3]

The trial court held, however, that a delay in providing written notice to Aetna's home office materially prejudiced Aetna's ability to defend the case. The court granted judgment of no cause of action in favor of Aetna. F L Aerospace appealed the trial court's decision that Aetna was prejudiced by late notice. Aetna cross-appealed the trial court's decision, among others, that in Michigan the insurance contract terms "sudden and accidental" are to be interpreted as non-temporal, i.e., whether such pollution was "expected" or "intended" from the standpoint of the insured. The appeal was heard by the Court of Appeals for the Sixth Circuit on September 29, 1989.

In its March 1, 1990 opinion the Sixth Circuit affirmed the trial court, but for reasons other than those used by the trial court. The Sixth Circuit found that contrary to five published and unpublished

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[3] The "pollution exclusion" provides that Aetna insurance does not apply:

> to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contamination or pollutants into or upon land, the atmosphere or any watercourse or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.* (Emphasis added.)

opinions of the Michigan Court of Appeals, the Michigan Supreme Court would hold that the terms "sudden and accidental" in a general liability insurance contract are unambiguous and exclusively temporal; that is, they can only refer to events of brief temporal duration.

The Sixth Circuit rejected all of the Michigan appellate opinions as not determinative of Michigan law. The court found them variously to be without "explanation" or "analysis." The Court said none of the opinions held the terms "sudden and accidental" were ambiguous, (one opinion, *Shue* v *D&B Brine, supra*, did so hold) and none of the opinions ruled out the possibility of a temporal interpretation of those terms. On these bases the Sixth Circuit concluded that, since it did not deem any of the Michigan Court of Appeals opinions rose to the stature of a definitive pronouncement of Michigan law, it was free to look "to other sources of law on this question."

These "other sources" were Michigan Supreme Court opinions on the general rules of interpretation of insurance contracts. The Court found that "ambiguous" terms are construed against the drafter, but no construction is required for "unambiguous" terms. Such terms are to be construed according to their "strict, plain, common meaning" and "should not be perverted merely to benefit the injured party."

Applying these principles the Sixth Circuit found that its interpretation of the terms "sudden and accidental" was closer to its perception of the Michigan Supreme Court's likely interpretation than was the Michigan Court of Appeals'. Relying on non-contextual definitions found in dictionaries, the Sixth Circuit expressly acknowledged that its "interpretation of the 'sudden and accidental' exception departs from the

Michigan Court of Appeals decision in *Jonesville* as well as several subsequent Michigan Court of Appeals decisions; . . . ." It concluded, however, that the Michigan Supreme Court would apply the rules of construction it cited and hold "the word 'sudden' has a plain, everyday temporal component and would interpret the 'sudden and accidental' exception in light of that finding." [4]

Petition for Rehearing and Suggestion for Rehearing en Banc was filed on March 15, 1990. Pursuant to direction of the Court Aetna filed a Response on April 26, 1990. On May 17, 1990 the Court of Appeals denied the Petition for Rehearing.

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[4] Petitioner anticipates Respondent will cite the unpublished decision of *Chemetco, Inc.* v *Citizens Ins. Co.*, No. 87-328896-CZ (Mich Ct App Feb 13, 1990), in support of its temporal construction of "sudden" under Michigan law. Any reliance on this case would be misleading and inappropriate. The Sixth Circuit did not cite it or in any way rely on it, despite the fact that it was decided prior that Court's March 1st opinion. Defendant insurer in that case accepted the *Jonesville* definition that "sudden" means "happening without previous notice or with very brief notice, coming or occurring unexpectedly; unforeseen; unprepared for." Indeed, the thrust of the insurer's argument was that the discharge or release was intentional and not accidental and was therefore excluded from coverage. The analysis employed by the *Chemetco* Court is thoroughly consistent with the *Jonesville* definition of "sudden and accidental." But see *Grant-Southern Iron & Metal Co., et al.* v *CNA Insurance Co., et al.*, __ F2d __ (6th Cir, No. 89-1049, June 18, 1990), 1990 US App LEXIS 9667, wherein the Sixth Circuit cited *Chemetco* for the proposition that "the Michigan Court of Appeals now seems to be divided on the question of whether 'sudden and accidental' includes a temporal element." *Grant-Southern, supra*, n. 4.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that the Court should grant the writ of certiorari for two reasons:

1. To enforce the existing limits on the discretion of a federal court sitting in diversity to disregard and preempt the decisions of state courts construing state law.

2. To suspend the effect of the decision by the Court of Appeals for the Sixth Circuit until after the Michigan Supreme Court renders its decision in the three cases it has accepted for review.

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POINT I

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT VIOLATED THE *ERIE* DOCTRINE.

For over fifty years *Erie Railroad Co.* v *Tompkins*, 304 US 64 (1938) and subsequent decisions of this Court have ensured that federal courts would apply state law in diversity cases: "[T]here is no doctrine of "transcendental" or "general" law, which allowed federal judges to disregard the law of the forum state in diversity cases, were struck down. In diversity the law has been and is today the law of the forum state "whether it be of its legislature or of its Supreme Court." 304 US 79.

In the absence of clear statutory or state court precedent, however, it is well settled that federal courts must determine the state law based upon "rules of decision commonly accepted and acted upon by the bar and inferior Courts." *West* v *A T&T Co.*, 311 US 223, 236 (1940). In *West*, the Court of Appeals for the Sixth Circuit refused to follow an Ohio appellate court opinion in a case involving the same parties and issues as the case then before the Sixth Circuit.

West v *AT&T Co.* was an early post-*Erie* decision of this Court holding that a federal court should not disregard the decisions of intermediate state appellate courts *"unless it is convinced by other persuasive data that the highest court of the state would decide otherwise,"* 311 US 237 (emphasis supplied). Although the Sixth Circuit cited this language in its opinion here, it paid scant attention to its meaning; rather, the Court of Appeals below included only the observation that it was not persuaded by the reasoning of the then-five relevant Michigan appellate court opinions. It also reviewed general rules of contract interpretation found in several Michigan Supreme Court opinions — all of which are standard rules that were available to the five intermediate Michigan appellate courts when considering their decisions. On such dubious grounds the Sixth Circuit rejected an entire body of Michigan law and replaced it with its own "general law."

If the Sixth Circuit were to review "other persuasive data," *West, supra,* 311 US 237, it would find strong reinforcement for the conclusions reached by the five panels of the Michigan Court of Appeals. In two recent decisions in which state supreme courts reviewed insurance industry documents contemporaneous with the drafting of the "sudden and accidental" language, these courts noted forcefully that in appearances before several state insurance commissions in the early 1970's insurance company spokespersons — including Aetna's — represented that the "pollution exclusion clause" was intended only to clarify existing coverage so as to bar *intentional* polluters from insurance benefits under a comprehensive general liability policy.

Indeed, in one of those cases such representations, *inter alia,* were held to preclude Aetna itself from asserting a certain interpretation in that case for its own benefit. *Claussen* v *Aetna Casualty & Surety Co.,* 676 FSupp 1571 (SD Ga 1987), *certified question to Sup Ct of Ga,* 865 F2d 1217 (11th Cir Sept 29, 1989), *certi-*

fied question answered, Claussen v *Aetna Casualty & Surety Co.*, 259 Ga 333, 380 SE2d 686 (1989), 676 FSupp 1571, *rev'd and remanded*, 888 F2d 747 (11th Cir Sept 29, 1989). *Accord, Just* v *Land Reclaimation*, __ Wis __, __ NW2d __, No. 88-1656 (Wisc Sup Ct June 19, 1990) in which the Wisconsin Supreme Court concluded that the word "sudden" is "reasonably susceptible to different meanings and is therefore ambiguous," (Slip op, p 3), and that the phrase "sudden and accidental" means "damages that are unexpected and unintended." (Slip op, p 9). The *Just* court also found that this interpretation "comports with substantial evidence indicating that the insurance industry itself originally intended the phrase ["sudden and accidental"] to be construed as 'unexpected and unintended.'" (Slip op, p 9).

Just as the Sixth Circuit should have consulted Aetna's own prior testimony as reflected in the drafting history of the "sudden and accidental" clause before making its decision, it should also have consulted other recent decisions of the Michigan Supreme Court. In *Allstate Insurance Co.* v *Freeman*, 432 Mich 656, 443 NW2d 734 (1989), decided July 18, 1989, Michigan Supreme Court chief justice Dorothy Comstock Riley defined an "accident" as "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, *not anticipated, and not naturally to be expected.*" (Opinion of Riley, CJ) 443 NW2d 741 (emphasis supplied). This definition is devoid of any "temporal" element and presupposes sufficient ambiguity as to require interpretation.

There is no doubt that *West, supra*, remains a viable and vital holding in this Court. As recently as 1988 in *Hicks* v *Feiock*, 485 US 624 (1988), *West* was quoted at length in its support of the conclusion that despite arguments the California state appellate court had

misinterpreted state law: ". . . the California Supreme Court denied review of this case, and we are not free in this situation to overturn the state court's conclusions of state law." 485 US 630. In this respect the federal court may be said to be, in effect, sitting as a state court. *Bernhardt* v *Polygraphic Co.*, 350 US 198 (1956).

Consequently, to what extent is the Sixth Circuit, sitting as a Michigan state court, free to disregard state appellate authority, as it presumably was entirely free to do in pre-*Erie* days? The answer is *only* to the extent that it is convinced by "other persuasive data" that the state supreme court would not follow the recent decisions of its own appellate courts. Petitioner submits that the data cited by the Sixth Circuit — disagreement with the holdings in appellate cases and general rules of contract interpretation — are not "persuasive data" when compared with the definition of "accident" as found in *Freeman, supra*, the drafting history of the "sudden and accidental" language in the pollution exclusion clause (including Aetna's own statements to the state insurance boards) and the plethora of case law in a number of states holding that "sudden and accidental" are ambiguous terms.

POINT II

THIS COURT SHOULD ABSTAIN FROM RULING ON THIS PETITION UNTIL AFTER THE MICHIGAN SUPREME COURT HAS SPOKEN.

In *Harris County Commissioners Court* v *Moore*, 420 US 77 (1975), this Court held that "[w]here there is an action pending in state court that will likely resolve the state law questions underlying the federal claim, we have regularly ordered abstention," 420 US 83 (citations

omitted). In fact, however, federal courts around the country have not been faithfully adhering to this principle. Specifically, this Court is urged to note that federal court interpretations of "sudden and accidental" have often disagreed with the interpretations of intermediate level state appellate courts.[5] The present case thus affords the Court an opportunity to call a halt to the increasing disregard for state precedent exhibited by federal courts when exercising their diversity jurisdiction.

Here, the Sixth Circuit has improperly disregarded applicable Michigan precedent when predicting how the Michigan Supreme Court would interpret the terms "sudden and accidental" as used in an insurance contract relating to claims for environmental issues. Moreover, the proper interpretation of those terms in that context is now squarely before the Michigan Supreme Court in *Upjohn*, *Polkow*, and *City of Woodhaven*, *supra*. If the Sixth Circuit's prediction of Michigan law

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[5] See, e.g., *C. L. Hauthaway & Sons* v *American Motorists Insurance Co.*, 712 FSupp 265, 268 (D Mass 1989) (disagreeing with intermediate level Massachusetts appellate court on proper interpretation of pollution exclusion); *Borden, Inc.* v *Affiliated FM Ins. Co.*, 682 FSupp 927, 929-30 (SD Ohio 1987) (disagreeing with intermediate level Ohio appellate court on proper interpretation of pollution exclusion), *aff'd*, 865 1267 (6th Cir), *cert denied*, 110 SCt 68 (1989).

Federal district courts have also disagreed with one another on the proper construction of the pollution exclusion under the laws of their respective states. *Compare Hayes* v *Maryland Casualty Co.*, 688 FSupp 1513, 1515 (ND Fla 1988) ("sudden and accidental" pollution exclusion bars coverage for routine discharges of waste) with *Pepper's Steel & Alloys, Inc.* v *United States Fidelity & Guar. Co.*, 668 FSupp 1541, 1548-50 (SD Fla 1987) ("sudden and accidental" pollution exclusion applies only when the insured intends to harm the environment), and *Ray Indus.* v *Liberty Mut. Ins. Co.*, 728 FSupp 1310, 1315-20 (ED Mich 1989) (continuous discharge of pollutants over thirteen-year period not "sudden and accidental") with *United States Fidelity & Guar. Co.* v *Thomas Solvent Co.*, 683 FSupp 1139, 1155-61 (WD Mich 1988) ("sudden and accidental" exception to pollution exclusion is ambiguous and not limited to events that happen over a short period of time).

is proven incorrect, its holding should be vacated so that Petitioner may yet press its claims against Aetna for defense and indemnity costs, and this Court would not be required to reach the issue of whether the Sixth Circuit's actions run afoul of *Erie*. Although Petitioner believes strongly that reversal of the Sixth Circuit's decision is proper on the basis of *Erie* alone, the fact that the Michigan Supreme Court will decide these issues argues strongly for the granting of our Petition and abstention pending the Michigan Court's decision.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

By: /s/ WALLACE K. SAGENDORPH
Counsel of Record for Petitioner
SAGENDORPH AND MOORE, P.C.
5455 Corporate Drive, Suite 301
Troy, Michigan 48098-2620 (313) 641-1860

Of Counsel:
ALLEN KEZSBOM
ALAN V. GOLDMAN
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A partership including professional corporations)
One New York Plaza
New York, New York 10004-1980 (212) 820-8000

Dated: Troy, Michigan
August 13, 1990

APPENDIX TO PETITION FOR CERTIORARI

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ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed May 17, 1990)

(F L AEROSPACE CORPORATION, ETC., Plaintiff-Appellant Cross-Appellee, v. AETNA CASUALTY INSURANCE COMPANY, ETC., Defendant-Appellee Cross-Appellant — No[s]. 88-2051/2106)

BEFORE: MERRITT, Chief Judge; RYAN, Circuit Judge; and BROWN, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
(See Sixth Circuit Rule 24)

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed March 1, 1990)

(F L AEROSPACE, Plaintiff-Appellant, Cross-Appellee, v. AETNA CASUALTY & SURETY CO., Defendant-Appellee, Cross-Appellant — Nos. 88-2051/2106; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: MERRITT, Chief Judge; RYAN, Circuit Judge; and BROWN, Senior Circuit Judge.

BAILEY BROWN, Senior Circuit Judge.

F L Aerospace ("Aerospace"), the successor in interest to Midland-Ross Corporation ("Midland-Ross"), the original insured party under Comprehensive General Liability ("CGL") policies issued by Aetna Casualty & Surety Company ("Aetna"), appeals a bench trial decision of no cause of action in favor of Aetna.[1] Aetna cross-appeals the district court's denial of its motion for summary judgment and cross-appeals the bench trial decision to the extent that it denied some of Aetna's defenses. This diversity action arose out of Aetna's refusal to indemnify Midland-Ross for money Midland-Ross expended to settle two private nuisance actions and to pay Midland-Ross' assessed portion of costs associated with an Environmental Protection Agency ("EPA")-mandated clean-up of the Berlin and Farro industrial waste site ("Berlin & Farro site") in Swartz Creek, Michigan. Aetna

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[1] Aerospace succeeded Midland-Ross sometime after Midland-Ross filed the complaint on February 22, 1987. We will refer to the insured as Midland-Ross throughout the opinion.

refused to indemnify Midland-Ross, contending that, in violation of policy provisions, Midland-Ross had failed to give proper notice of the claims and had made voluntary payments, that the clean-up costs were not "damages" and the loss did not constitute an "occurrence" within the meaning of the policy, and that the policy's pollution exclusion provision barred recovery.

After denying Aetna's motion for summary judgment,[2] the district judge found that there was an "occurrence" within the meaning of the policy and that the pollution exclusion was not a bar to recovery; however, he also found that Midland-Ross had failed to notify Aetna timely in writing as required by the policy and that this failure materially prejudiced Aetna. The district judge also found that any payments made to settle the nuisance claims and the clean-up claim were voluntary. He held, therefore, that there was no cause of action against Aetna. We believe, however, that the pollution exclusion provision does bar recovery under the facts of this case; therefore, we do not reach the other issues. Accordingly, we affirm the judgment of no cause of action in favor of Aetna on that basis.

FACTS

Midland-Ross was insured for the period January 1, 1966 through January 1, 1975, under CGL policies issued by Aetna. During the period between April, 1973 and September, 1975, Midland-Ross had liquid industrial waste removed from its manufacturing facility in Owosso, Michigan by Berlin & Farro, which was licensed by the state of Michigan to haul and store industrial waste. Berlin & Farro transported the liquid

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[2] The district court, in resolving Aetna's summary judgment motion, agreed with Midland-Ross that the clean-up costs were "damages" within the meaning of the policy.

waste in its trucks and stored it at its site in Swartz Creek.

Midland-Ross was named as one of numerous defendants in two separate civil actions in nuisance filed in October, 1983 and March, 1984, respectively, by individuals living near the Berlin & Farro site. We will refer to these actions in this opinion as the *Bradford* and *Acker* actions. The plaintiffs in both actions alleged that the waste at the site had contaminated the earth there and that the contamination was likely to migrate to their residences. They alleged bodily injury and property damage as a result of the nuisance created by the Berlin & Farro site.

In addition to this potential tort liability, Midland-Ross received notification from the EPA in September, 1983, that an investigation of the Berlin & Farro site had resulted in a finding that Midland-Ross was possibly in violation of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675. Subsequently, Midland-Ross consented to pay its share of EPA-mandated clean-up costs in an amount equal to the percentage Midland-Ross' waste was to the total waste stored at the Berlin & Farro site.

Although Midland-Ross' representatives spoke informally with Aetna's sales agent in late 1983 about the filing of the *Bradford* action, no written notice was given concerning the civil actions until November, 1984; and none was given regarding the EPA matter until June, 1985, some fifteen months after Midland-Ross had agreed to pay its portion of the clean-up costs. Midland-Ross eventually was assessed a clean-up amount of $508,561.00, and it settled the *Bradford* and *Acker* matters in late 1986 for a total of $61,503.42. Once all settlements were final and binding on Midland-

Ross, the company requested reimbursement for the clean-up and settlement amounts, as well as for related attorney fees and costs. Some seven weeks later, after having received no favorable responses from Aetna, Midland-Ross filed this action.

Aetna moved for summary judgment, contending that, on the undisputed record, each and all of its defenses heretofore stated prevented recovery. The district court held that the payment required in the clean-up proceeding was "damages" within the meaning of the policy and that the other defenses of Aetna raised issues of fact that could not be disposed of at the summary judgment stage.

During the trial, the district court heard uncontroverted testimony from John Shauver of the EPA about contamination at the site. Shauver testified that he investigated the Berlin & Farro site following complaints in 1972-73 about odors and the general operation of the incinerator. Either he or others employed by him were at the site at least weekly during the period 1972 through January 1, 1975, when Aetna's coverage applied.

Shauver learned that Berlin & Farro maintained plastic-lined storage lagoons for liquid waste. Each truck that transported waste into the site was required to carry a liquid waste removal record that identified the waste source and the description and quantity of waste involved. Shauver recalled that some of the vehicles carried waste from Midland-Ross' facility in Owosso.

Shauver testified that because truck drivers were usually in a hurry or not paying attention, it was not uncommon for them to pull hoses out of the lagoon without first allowing the hoses to drain, thereby

allowing one or two gallons of waste to fall onto the ground outside of the lagoon. Because Shauver and other EPA employees were not present at all times and Berlin & Farro operated the site twenty-four hours a day, he could not testify as to the total amount of spillage. He estimated, however, that there was a substantial amount. Notwithstanding that estimate, he did not testify that any of the spillage came from the Midland-Ross facility.

Shauver also testified that in 1978, the north lagoon swelled and exceeded its bank as a result of severe storms, and in 1981, while Berlin & Farro was attempting to solidify the north lagoon, contaminated soil became mixed with uncontaminated soil, resulting in the need for a clean-up by a state agency. Both of these events, of course, came well after Aetna's coverage had ceased.

After the bench trial, the district court found that there was an "occurrence" within the meaning of the policy and that the "sudden and accidental" exception to the pollution exclusion clause applied so that the pollution exclusion clause did not bar recovery. However, the district court found that informal verbal communications with Aetna's sales agent did not satisfy the policy's notice requirement, that the written notice to Aetna was untimely and prejudicial to Aetna, and that any payments by Midland-Ross were voluntarily made. The court granted judgment of no cause of action in favor of Aetna.

ANALYSIS

We conclude, as we have heretofore indicated, that the district court erred in its determination that the pollution exclusion provision does not apply. Accordingly, because we conclude that the pollution exclusion

does apply, we affirm the district court's decision dismissing the claim against Aetna.

Aetna's policy provides coverage for bodily injury or property damage caused by an occurrence. An "occurrence" is defined as

> an accident, including continuous or repeated exposure to conditions, which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **insured**[.]

This policy excludes coverage, however, for damage that is caused by pollution, unless the damage is caused by a "sudden and accidental" discharge, dispersal, release or escape of the pollutant. The pollution exclusion provides in its entirety:

> **This insurance does not apply:**
>
> . . . .
>
> (f) to **bodily injury** or **property damage** arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*

(Emphasis added.) There is no question but that any damages in this case were caused by pollution. It is the "sudden and accidental" exception to the pollution exclusion that we must interpret to decide whether or not coverage is barred in this case.

We begin by stating the well-known rule that a federal court sitting in a diversity case must apply the state law that the state court in that state would apply. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). Furthermore, the federal court must apply a state's law in accordance with the controlling decisions of the highest court of that state. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941). Michigan law, therefore, controls in this case, but the Michigan Supreme Court has never interpreted the policy provision at issue, although the meaning of "sudden and accidental" has been litigated often in Michigan,[3] and this court unsuccessfully attempted to have the Michigan Supreme Court answer the question in 1989.[4] We must, therefore, determine what the Michigan Supreme Court would decide if the question were before it. To make this determination, we must look at available data on the subject. *Clutter* v. *Johns-Manville Sales Corp.*, 646 F.2d 1151, 1153 (6th Cir. 1981).

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[3] *See Firemen's Fund Ins. Co.* v. *Ex-Cell-O Corp.*, 702 F. Supp. 1317 (E.D. Mich. 1988) ("Ex-Cell-O II"); *United States Fidelity & Guar. Co.* v. *Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988); *Fireman's Fund Ins. Co.* v. *Ex-Cell-O Corp.*, 685 F. Supp. 621 (E.D. Mich. 1987) ("Ex-Cell-O I"); *American States Ins. Co.* v. *Maryland Casualty Co.*, 587 F. Supp. 1549 (E.D. Mich. 1984); *Polkow* v. *Citizens Ins. Co. of America*, No. 108437 (Mich. Ct. App. Oct. 17, 1989); *Upjohn Co.* v. *New Hampshire Ins. Co.*, 178 Mich. App. 706, 444 N.W.2d 813 (1989); *Protective Nat'l Ins. Co.* v. *City of Woodhaven*, No. 101968 (Mich. Ct. App. Sept. 28, 1988) (unpublished), *leave to appeal denied*, 432 Mich. 927 (1989); *Shue* v. *D&B Brine, Inc.*, No. 92404 (Mich. Ct. App. July 27, 1987) (unpublished); *Jonesville Prod., Inc.* v. *Transamerica Ins. Group*, 156 Mich. App. 508, 402 N.W.2d 46 (1986), *leave to appeal denied*, 428 Mich. 897 (1987). There presently are other cases pending before this court, including *International Surplus Lines* v. *Anderson Dev.*, No. 87-2102, and *Grant-Southern Iron & Metal* v. *CNA Ins.*, No. 89-1049.

[4] A panel of this court certified this question to the Michigan Supreme Court in *International Surplus Lines* v. *Anderson Dev.*, No. 87-2102, on January 26, 1989. The Michigan Supreme Court declined to answer the question on July 10, 1989.

Midland-Ross urges us to follow, as the district court did, *Jonesville Products, Inc.* v. *Transamerica Ins. Group*, 156 Mich. App. 508, 402 N.W.2d 46 (1986), *leave to appeal denied*, 428 Mich. 897 (1987), which held that the "sudden and accidental" exception to the pollution exclusion provision means that the exclusion does not apply if the discharges were "unexpected" and "unintended" from the standpoint of the insured. In other words, *Jonesville* interpreted the requirement of the exception that the discharge be "sudden" to mean only that it be "unexpected." The *Jonesville* court said:

> We find that the circuit court failed to distinguish between the frequency of acts which resulted in the release of contaminants and plaintiff's knowledge or notice of the release of pollutants as a result of those acts.
>
> . . . .
>
> The circuit court erred in finding that the allegation of "continuous" negligent discharge of waste onto Jonesville's property took . . . the . . . complaint out of the defendant's exception for "sudden and accidental" release. It is possible that the releases could have been sudden, i.e., unexpected, and accidental, i.e., unintended, and thus outside the exclusion. Plaintiff's affiant swore that plaintiff had no knowledge of prior complaints regarding dumping or spillage.

Id. at 512, 402 N.W.2d at 48. Thus, *Jonesville*, without explanation, failed to give any temporal meaning to the word "sudden" in the "sudden and accidental" exception to the pollution exclusion.[5]

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[5] In *Jonesville*, the issue that the trial court had before it, on summary judgment, was whether the insurer had a duty to defend

(*concluded on page A-10*)

Aetna urges that we not follow *Jonesville*, claiming that its definition of "sudden and accidental" distorts the plain meaning of the phrase. Aetna contends that we should define the term "sudden" as we did in *United States Fidelity & Guaranty Co.* v. *Star Fire Coals, Inc.*, 856 F.2d 31, 34 (6th Cir. 1988), a Kentucky diversity case in which this court construed the "sudden and accidental" exception by giving the word "sudden" a temporal meaning.

Although we recognize that the Michigan Court of Appeals in *Jonesville* offered no analysis in announcing its definition, we are mindful that an intermediate appellate court's judgment that announces a rule of law is "'a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" *Woodruff* v. *Tomlin*, 616 F.2d 924, 929 (6th Cir.) (quoting from *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940)), *cert. denied*, 449 U.S. 888 (1980). Moreover, a federal court should not reject a state rule just because it was not announced by the highest court of the state, even if the federal court believes that the rule is unsound in principle. *Id.* at 928-29. We turn our attention, therefore, to other sources of law on this question to determine whether the Michigan Supreme Court would follow *Jonesville*.

Michigan law is settled concerning the interpretation of provisions in insurance contracts. In Michigan, the

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(*continued from page A-9*)

the insured because the "sudden and accidental" exception to the pollution exclusion did not apply. The *Jonesville* court, applying the Michigan rule that the insurer has a duty to defend if the claim is even arguably covered by the policy, gave this interpretation of the "sudden and accidental" exception to the pollution exclusion. The issue in the instant case focuses on the insurer's duty to indemnify.

rules for the construction of an insurance contract are the same as for any other written contract. *Hall* v. *Equitable Life Assur. Soc'y*, 295 Mich. 404, 295 N.W. 204 (1940). Any ambiguous terms must be construed against the insurer and in favor of the insured, because the insurer drafts the document. *Mays* v. *Insurance Co. of N. Am.*, 407 Mich. 165, 284 N.W.2d 256 (1979). On the other hand, if the terms in the policy are not ambiguous, "no construction, in the usual sense of the word, is called for." *Schiff* v. *Automobile Ins. Co.*, 290 Mich. 457, 287 N.W. 920 (1939); *see also Indemnity Ins. Co. of N. Am.* v. *Geist*, 270 Mich. 510, 259 N.W. 143 (1935). When the words are free from ambiguity, "the instrument is always to be construed according to the strict, plain, common meaning of the words themselves." *Hall*, 295 Mich. at 408, 295 N.W. at 206. Moreover, the plain meaning of words should not be perverted merely to benefit the insured party. *Wozniak* v. *John Hancock Mut. Ins. Co.*, 288 Mich. 612, 286 N.W. 99 (1939).

We think that the terms "sudden" and "accidental" are not ambiguous and should be given their plain, everyday meaning. We note that this finding is not at odds with the *Jonesville* decision to the extent that nothing in that opinion or in subsequent Michigan Court of Appeals decisions relying on it have indicated that the terms should be given anything other than their plain meaning.[6] The dictionary definition of "sudden"

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[6] The Michigan Court of Appeals steadfastly has affirmed its *Jonesville* definition. *See Polkow* v. *Citizens Ins. Co. of Am.*, No. 108437 (Mich. Ct. App. Oct. 17, 1989); *Upjohn Co.* v. *New Hampshire Ins. Co.*, 178 Mich. App. 706, 444 N.W.2d 813 (1989); *Protective Nat'l Ins. Co.* v. *City of Woodhaven*, No. 101968 (Mich. Ct. App. Sept. 28, 1988) (unpublished), *leave to appeal denied*, 432 Mich. 927 (1989). None of these cases, however, have held that the terms "sudden" and "accidental" are ambiguous. Moreover, the

(*concluded on page A-12*)

is "happening, coming, made or done quickly, without warning or unexpectedly; abrupt." *American College Dictionary* 1209 (1970). *See also Webster's Third New Int'l Dictionary* 2284 (1961). The term "accidental" means "happening by chance" or "unintentional" or "fortuitous." *American College Dictionary* 8; *Webster's Third New Int'l Dictionary* 11. These definitions comport with the common understanding of the terms as they are used in everyday parlance. A sudden and accidental event is one that happens quickly, without warning, and fortuitously or unintentionally.

We recognize that our interpretation of the "sudden and accidental" exception departs from the Michigan Court of Appeals decision in *Jonesville* as well as from several subsequent Michigan Court of Appeals decisions;[7] however, we believe that the Michigan Supreme Court, following its own rules of insurance contract interpretation, would find, as we have found,[8] that the word "sudden" has a plain, everyday temporal component and would interpret the "sudden and accidental" exception in light of that finding. Moreover, we think it is worthy of noting that the Michigan Court of Appeals,

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(*continued from page A-11*)

decision in *Shue* v. *D&B Brine, Inc.*, No. 92404 (Mich. Ct. App. July 27, 1987), although not citing to *Jonesville*, dealt with the same question that we now are dealing with, and that opinion stated that "[p]laintiffs' broad allegations do not rule out the possibility of a discharge which was 'sudden and accidental,' *as those terms are commonly understood.*" (Emphasis added.)

[7] *See* cases cited *supra* at note 6.

[8] *See also Fireman's Fund Ins. Co.* v. *Ex-Cell-O Corp.*, 702 F. Supp. 1317, 1325 (E.D. Mich. 1988) ("Ex-Cell-O II"), in which the district judge, applying Michigan law, reached the same conclusion that we reach here.

in a case subsequent to *Jonesville*, itself indicated that the word "sudden" in the "sudden and accidental" exception has a temporal component. In *Protective National Ins. Co.* v. *City of Woodhaven*, No. 101968 (Mich. Ct. App. Sept. 28, 1988), *leave to appeal denied*, 432 Mich. 927 (1989), an unpublished case, a child died from alleged exposure to a pesticide sprayed on trees by the city. The fumes from the pesticide allegedly entered his family's home through an open window from the street where the spraying occurred. The court of appeals, in reviewing the trial court's grant of summary judgment in favor of the insurer on the question of whether the insurer had a duty to defend, stated:

> [W]hile it is clear from the record that the release of the pesticide was a regular, intentional activity of defendant, it is arguable that the "dispersal" or "escape" of the pesticide to an area where it could come in contact with Ronald Vann's skin was both a sudden and accidental event, which caused injury to Ronald Vann. *Potentially, a temporal event, i.e., a sudden gust of wind, blew the pesticide into the window of the Vann's* [*sic*] house causing the injury.

(Emphasis added.) *Id.* at 4.

Turning now to the facts of the case at hand, we cannot agree with Aetna's position that simply because Berlin & Farro transported some 500,000 gallons of Midland-Ross waste to the Berlin & Farro site over a period of years, any discharges cannot be considered sudden and accidental. The "sudden and accidental" exception applies to the discharge, release, dispersal or escape of pollutants into the environment. Mere delivery of waste for storage at a facility that is licensed

to store waste is not a discharge of pollutants into the environment.

On the other hand, there is no evidence from which the trial court could have found that any pollution damage that was the subject of the October, 1983 and March, 1984 nuisance actions or the EPA clean-up was caused by any "sudden and accidental" discharge of any Midland-Ross pollutant from the Berlin & Farro facility, the last of which was delivered to the site in September, 1975.[9]

Accordingly, we AFFIRM the judgment of the district court of no cause of action in favor of Aetna.

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[9] Midland-Ross does not contend that it has shown that the evidence supports such a finding. Its position in this case apparently was that, relying on *Jonesville*, it did not need to supply that proof.

JUDGMENT OF NO CAUSE FOR ACTION IN FAVOR OF DEFENDANT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Session held September 30, 1988)

(F L AEROSPACE CORPORATION, a foreign corporation, Successor In Interest To MIDLAND-ROSS CORPORATION, Plaintiff, vs AETNA CASUALTY AND SURETY COMPANY, a foreign corporation, Defendant — No: 87 CV 60070 AA; HON. GEORGE LA PLATA)

At a session of said court held in the courthouse, City of Ann Arbor, Washtenaw County, Mich., on September 30, 1988.

PRESENT: HON. GEORGE LA PLATA,
United States District Court Judge.

The court having conducted a bench trial and on Aug. 23, 1988 the court having made certain conclusions of law and findings of fact on the record and in accordance therewith;

IT IS HEREBY ORDERED AND ADJUDGED that defendant AETNA CASUALTY AND SURETY COMPANY is hereby granted a judgment of no cause for action in its favor.

/s/ JUDGE GEORGE LA PLATA
Judge, United States District Court

APPROVED AS TO FORM:
/s/ Wallace Sagendorph P 19838
Attorney for PLAINTIFF

(*Certification Omitted*)

OPINION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Proceedings of August 23, 1988)

(F L AEROSPACE CORPORATION, Successor in Interest to MIDLAND-ROSS CORPORATION, an Ohio corporation, Plaintiff, vs. AETNA CASUALTY AND SURETY COMPANY, a foreign corporation, Defendant — Case No. 87-CV-60070AA; Volume No. I)

PROCEEDINGS HAD in the above-entitled matter before the Honorable GEORGE LA PLATA, United States District Judge of the Eastern District of Michigan, Southern Division, at U.S. Courthouse and Federal Building, 200 E. Liberty, Ann Arbor, Michigan, on Tuesday, August 23, 1988.

APPEARANCES: MR. WALLACE K. SAGENDORPH, Esq., on behalf of the Plaintiff; MR. CHARLES W. BROWNING, Esq., on behalf of the Defendant

* * *

(4) August 23, 1988
Ann Arbor, Michigan

(On the record at about 8:31 a.m.)

THE CLERK: The Court calls the case of Midland-Ross versus Aetna Casualty and Surety Company, number 87-0070.

THE COURT: Mr. Sagendorph, why don't you take a seat at the table.

MR. SAGENDORPH: Okay.

THE COURT: All right. This is an action for defense and indemnification costs pursuant to insurance policies previously in existence between Midland-Ross Corporation, the predecessor in interest to plaintiff F L Aerospace, and Aetna Casualty and Surety Company.

The six comprehensive general liability policies in question cover a continuous period from January 1st of 1966 to January the 1st of 1975. And pursuant to the complaint that was filed in this case, by Aerospace Corporation, the plaintiff is asking the following:

For an award for breach of contract of sixty one thousand five hundred and three dollars forty two cents in settlement amounts paid with respect to the Bradford and Aker [*sic*] litigation;

(5) Five hundred and eight thousand five hundred and sixty one dollars, paid to date in connection with the USEPA-ordered clean up at the Berlin and Farro site;

Then the sum of one hundred sixty six thousand seven sixty four dollars and seventy four cents in attorney fees, expert witness fees and related costs paid to defend the Bradford-Aker cases, as well as the EPA clean up indemnification for present and future liability and reimbursement for expenses for phase two and possible subsequent phase liability for clean up costs and related attorney fees and costs, many amounts of which are not known at this time.

Because of the fact that a more than adequate joint final civil pretrial order was issued and put together by the counsel for both parties, this Court is going to incorporate the facts as set out in that pretrial order. So I'm not going to recite the facts at this time.

The parties have, in addition, stipulated to numerous facts, and they comprise pages ten through sixteen of the final pretrial order. And the Court's going to incorporate that as part of its, of the Court's final decision.

Now the issues of fact that remain to be litigated was one, whether Midland-Ross failed to give Aetna timely notice of an occurrence as required in condition 4(a) of (6) the policies.

Two, whether Aetna has been materially prejudiced in its duty to defend or indemnify by any action of Midland-Ross.

And three is whether Midland-Ross voluntarily entered into a consent decree with USEPA requiring it to pay five hundred and eight thousand five hundred sixty one dollars in clean up costs without notice to Aetna, contrary to condition 4(c) of the policies.

Four is whether Midland-Ross' payment of five hundred eight thousand five hundred sixty one dollars in the clean up costs was unreasonable in that it did not ship any hazardous waste to Berlin-Farro.

And five is whether Midland-Ross' generation of waste was a continuous and systematic part of its business activity.

And six whether Midland-Ross knew or should have known that its transporting of waste would contribute to the creation of a nuisance at the Berlin-Farro site.

Seven is whether Midland-Ross has suffered and will continue to suffer damages as a result of defendant's breach.

And eight is whether the plaintiff violated condition 4(b) of the policies by failing to immediately deliver legal papers to Aetna relating to the EPA, Bradford (7) and Aker claims.

Nine is whether Midland-Ross failed to give Aetna a timely written notice of the occurrence as required in condition 4(a) of the policies.

And ten is whether the plaintiff violated condition 5 of the policies which indicates that no action shall be filed against the company without full compliance with all policy terms.

Now the Court had the benefit of the testimony of the following witnesses. Three of them were live, that was John Schauver, the DNA representative, Eugene Bulgrin, who is the head of the risk management department at Midland-Ross, and Michael Babbitt, the corporate attorney for Midland-Ross.

In addition, the Court had the benefit of the deposition testimony of the following: Michael Taylor, senior analyst for Aetna; Douglas Grund, the manager of the commercial claim department for Aetna; David Duran, was in the risk management department of Midland-Ross and worked closely with Gene Bulgrin; James Vicker, Vickers, who was the president of Luce, Smith and Scott. And these were the folks who sold the insurance policies to, to Aetna. And including — I should say sold the insurance policies to Midland-Ross, including the Aetna policy; John D. Stevenson, who was the senior claims representative of Aetna; and (8) Benton H. Gallup, who was the senior analyst for Aetna.

Now the first matter the Court will take up is the question about whether this was an occurrence. And this is a matter that was, that was brought forth by the defendant and vigorously defended by the defendant. And the essence of it goes to the question of the interpretation by this Court of the provision in the policy which reads as follows, and that's under the CGL insurance policy, and it provides as follows:

> Bodily injury liability coverage, property damage liability coverage. The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence.

And then we drop down and look at the definition of occurrence and it states as follows:

> Occurrence means an accident, including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

(9) Now included within the provision coverage is an exclusion. And it reads as follows:

> Exclusions: This insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.

And the defense of course urged this Court to adopt the regular understanding of the words sudden and accidental. And sudden and accidental would seem to indicate that it would have to be something that happened quickly, unexpectedly, possibly, and accidental.

The plaintiff, of course, argued that under the recent ruling of the Court of Appeals in the State of Michigan, and this Court is duty bound to follow the Michigan substantive law, that Jonesville case equated sudden and accidental with unintended and unexpected.

(10) Now just for a brief review of the facts there, and these facts are stipulated and agreed to by the parties, there's no question in this case that Midland-Ross shipped in excess of five hundred thousand gallons of liquid waste material to Berlin-Farro, but it's of sudden interest to note that all shipments were made by Berlin and Farro trucks. There's nothing in the record and

there is no testimony this Court knows of which indicates that the plaintiff, Midland-Ross, had any knowledge that there was anything wrong with what was transpiring at Schwartz Creek, or that the operation of any of the equipment by Berlin-Farro was defective or in any way causing any kind of problem.

So with that background of facts, this Court, being duty bound to follow the Michigan laws announced in Jonesville, which I say again equates the words sudden and accidental with unintended and unexpected, and that is from the insured's viewpoint, this Court finds specifically that the exclusion clause did not apply, and that the events at Berlin-Farro was [*sic*] an occurrence within the coverage of the policy.

Now that brings us now to this question of notice. Now there was no dispute with regard to the fact that, as to the two lawsuits, the Bradford lawsuit and then the subsequent suit in the Akers case, that notice, that [11] written notice was not given to Aetna as soon as the Midland-Ross people received the papers in that case.

In fact, I think the, the notice was given some one year later with respect to the Bradford, seven months with respect to Akers. With respect to the action that was brought by the USEPA, notice was given some fifteen months after a, a commitment had been made by corporate counsel Babbitt on behalf of Midland-Ross. And even that notice was really in response to a letter from Aetna asking if in fact the transmittal of certain papers was to be interpreted as a claim being made by Midland-Ross on the policy.

Now let's see what the notice provision says. That provision says, it's under 4, Section 4, it says:

> Insured's duties in the event of occurrence, claim or suit: (a) In the event of an occurrence, written notice containing particulars sufficient

> to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses shall be given by or for the insured to the company or any of its authorized (12) agents as soon as practicable.

Now the Court scrutinized the testimony of Gene Bulgrin, who ran the risk management program for Midland-Ross, the testimony of Jim Vickers, James Vickers, the chap who, who sold the policies to Midland-Ross, and the testimony of Michael Babbitt, the testimony of Mr. Duran, who was the other fellow that worked on risk management.

And Mr. Bulgrin testified that he had regular contacts with Mr. Vickers. And he said that, that it was not unusual at all for him to phone in claims. And that in fact, 4(a) really had no significance to him, because of his daily, he said almost regular daily contact with Mr. Vickers. However, he did indicate in his testimony that he knew that Jim Vickers was in sales and was not a claims man.

And Mr. Bulgrin's testimony was to the affect [*sic*] that Mr. Bulgrin himself had extensive experience in the insurance business. In fact, he was a supervisor at Kemper before going to Midland-Ross.

He told us that he talked with Jim Vickers about this pollution problem up at Schwartz Creek, and they discussed the problem about the, the exclusion of provision in the CGL. And they both came to the conclusion that, that it applied. And so that therefore, (13) no claim would be made.

In answer to the question, well, why not make a claim anyway, Mr. Bulgrin testified that's not a professional way to do things and I don't do things that way.

Then what happened is he tells you that, subsequent thereto, that because of recent Court decisions that seemed to indicate that the Courts were interpreting that sudden and accidental in different matters, that he felt he should submit a claim. And of course they did. But they did not submit the EPA claim at that time.

And there's no question, I think Mr. Bulgrin made it perfectly clear that he understood that, even though, because of his contacts with Jim Vickers, that even though a claim, or even though Vickers indicated that the claim may not be honored, that he knew you're supposed to submit the claim because Mr. Vickers could not bind the company as to whether they denied claim or accepted claim.

Mr. Vickers' testimony is sort of interesting because he sort of disputes a lot of the things that Mr. Bulgrin said. For example, he said that he had a lot of contacts with Mr. Bulgrin, but they were really not about much more than the, than the surety bonds that he dealt with. And he said that's really the majority of his contact with Mr. Bulgrin was regarding the surety bond.

(14) That he knew very little about the pollution problem. That he possibly could have discussed it with Mr. Bulgrin. Doesn't dispute that Mr. Bulgrin's testimony that the two of them agreed it probably was not covered by the policy was probably true.

Now what about Mr. Babbitt? Mr. Babbitt's the attorney for the company. And he was responsible for the management of all the environmental claims that were made against Midland-Ross. He managed the claim, he retained counsel, consultants, experts or anything like that.

And it was of some interest to this Court to note that the way this Midland-Ross operated that many times the matters did not pass between risk management and the legal department, as you would think

they would, so that each party would know what the other one was doing.

And so, this Court, in listening to the testimony and reviewing all the documents and exhibits, came to the conclusion that it was obvious that, that there were certain things being done and certain things not having been done which were confusing to risk management and to the legal department, and it's very possible that that had something to do with the fact that, that written notice was not made as it should have been under the provisions of the policy.

Mr. Babbitt got himself involved in the EPA (15) problem, and he indicated that the notification by the agency caused an immediate problem for him. That they did not have a lot of time to consider it. That they were being charged, along with many other generators, with liability under the federal statutes, and they just did not have a lot of time to do a lot of investigation and other things that probably should have been done.

But anyway, the significant thing is that, that the notice, the first notice was sent out on September the 19 of 1983. And then there was an administrative order that was dated March the 7th of 84, and that is a lapse of some six months, and no notice had been given to Aetna with respect to that.

And this Court is aware of the fact that, in a situation like that, Mr. Babbitt could have sought a declaratory judgment in a Federal Court and sought injunctive relief.

And this is especially true, because all through this litigation, Midland-Ross has taken the position that they did nothing wrong. And this Court agrees with that position, as a matter of fact, because there is no evidence that Midland-Ross knew or should have known that any of the material which was all, which is

ninety percent water soluble, were causing any problem at, at Berlin-Farro.

Then of course, we had the testimony of Mr. (16) Stevenson, Mr. Gallup, Mr. Grund about the meetings that took place between Mr. Babbitt and Mr. Sagendorph, who's counsel for the, for Midland-Ross in this lawsuit, concerning the matters of coverage and defense.

And there's certain testimony that, at one of these meetings, the representatives of Aetna agreed that, that they were liable, at least to defend, if not to indemnify, based on the, on the provisions of the policy, the exclusion clause, the notice provision, and then the settlement provision.

Well under Michigan law, Michigan interprets standard notice clauses to require notice within a reasonable time, that's Kennedy versus Dashner.

In determining whether notice is timely, the Court places the burden upon the insurer, that of course would be Aetna, to demonstrate that it has been prejudiced by the insured's inaction. That's Wendel versus Swanberg, 348 Michigan 468.

And the Court, in determining prejudice, took into account the question of time, the question of available defenses, the question of being able to select their own counsel, and the, the ability to, to bring in experts and to attempt to interpose a defense that would not create the liability that was obviously created here by the settlements with Bradford, Akers and the EPA.

(17) This Court makes the following findings of fact with respect to the notice provision. This Court finds that the verbal communications between the representatives of Midland-Ross and the representatives of Aetna were not sufficient to comply with the written notice provision contained in Section 4(a) of the policy.

The Court further finds that, although written notice was eventually tendered to defendant Aetna regarding Bradford-Akers and the EPA, the notices were untimely and prejudicial to the defendant.

This Court makes a further finding of fact that the defendants were prevented from engaging in any independent investigation within the time necessary to allow an informed decision regarding legal options, vis-à-vis the Bradford-Akers and EPA action.

This Court specifically finds that the meeting between plaintiff's representatives and defendant's representatives did not constitute a waiver of the notice provision 4(a).

This Court finds, that whether due to mismanagement, the subsequent takeover of Midland-Ross by FL Aerospace or the lack of a SOP regarding environmental claims, that there never was any meaningful compliance with the provisions of 4(b) of the policy.

This Court further finds, because the plaintiff (18) continually and during this trial contended there was no wrongdoing on its part, and this Court has indicated this Court felt that was true, this Court finds that a meritorious defense existed under the circumstances surrounding these actions.

Now this CGL policy also contained the following provision, and that was provision 4(c). And that provides that the:

> Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident.

And this Court looked at the decision of the Michigan Court of Appeals in Coil versus Wolverine Insurance, which is 120 Michigan Appeals 118. And in there the Court said that, I quote:

> That defendant, as insurance company, has bargained for the contractual right to contest the liability of its insured instead of having its money given away by an agreement to which it was not a party.

This Court specifically finds that the payments made in all three claims were voluntarily made, and (19) therefore violative of 4(c).

Section 5 of the policy provides:

> Actions against the company: No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy.

Applying this Court's finding of fact, this Court concludes the plaintiff has failed to carry the day. The defendant owes no duty to either defend or indemnify the plaintiff. This Court finds no cause of action in favor of defendant. That is the decision of the Court.

(Off the record.)

(Certificate of Reporter Omitted)

[*VARIOUS*] ORDERS OF THE MICHIGAN SUPREME COURT

ORDER

(State of Michigan — Supreme Court)
(Entered July 13, 1990)

(THE UPJOHN COMPANY, a Delaware corporation; JOHN RUSSELL BUTLER, a foreign insurance underwriter; FIRST STATE INSURANCE COMPANY, issuing property policy GC-809000, a Delaware corporation; and THE HOME INSURANCE COMPANY, a New York corporation, Plaintiffs-Appellees, v [86906] NEW HAMPSHIRE INSURANCE COMPANY, a New Hampshire corporation; GRANITE STATE INSURANCE COMPANY, a New Hampshire corporation; THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, a foreign corporation; and FIRST STATE INSURANCE COMPANY, issuing excess liability policy 916075, a Delaware corporation, jointly and severally, Defendants, and ALLSTATE INSURANCE COMPANY, Successor to NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, an Illinois corporation, Defendant-Appellant, and INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION, Amicus Curiæ)
(THE UPJOHN COMPANY, a Delaware corporation; JOHN RUSSELL BUTLER, a foreign insurance underwriter; FIRST STATE INSURANCE COMPANY, issuing property policy GC-809000, a Delaware corporation; and THE HOME INSURANCE COMPANY, a New York corporation, Plaintiffs-Appellees, v [86907] NEW HAMPSHIRE INSURANCE COMPANY, a New Hampshire corporation; THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, a foreign corporation; and FIRST STATE INSURANCE COMPANY, issuing excess liability policy 916075, a Delaware corporation, jointly and severally, Defendants, and ALLSTATE INSURANCE COMPANY, Successor to NORTHBROOK EXCESS AND SURPLUS

INSURANCE COMPANY, an Illinois corporation, Defendant-Appellant, and GRANITE STATE INSURANCE COMPANY, a New Hampshire corporation, Defendant-Appellee, and INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION, Amicus Curiæ]

[THE UPJOHN COMPANY, a Delaware corporation; JOHN RUSSELL BUTLER, a foreign insurance underwriter; and FIRST STATE INSURANCE COMPANY, issuing property policy GC-809000, a Delaware corporation, Plaintiffs-Appellees, and THE HOME INSURANCE COMPANY, a New York corporation, Plaintiff, v [86908] NEW HAMPSHIRE INSURANCE COMPANY, a New Hampshire corporation; and GRANITE STATE INSURANCE COMPANY, a New Hampshire corporation, Defendants, and ALLSTATE INSURANCE COMPANY, Successor to NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, an Illinois corporation, Defendant-Appellant, and THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, a foreign corporation; and FIRST STATE INSURANCE COMPANY, issuing excess liability policy 916075, a Delaware corporation, Defendants-Appellees, and INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION, Amicus Curiæ]

[SC: 86906, 86907, 86908; COA: 98969, 99012, 99145; LC: 85-288651-CK]

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

On order of the Court, the application for leave to appeal and the motion for leave to file brief amicus curiæ are considered, and they are GRANTED.

We further ORDER that this case be argued and submitted to the Court together with the cases of *Protective National Insurance Company* v *City of Woodhaven* (Docket No. 85180) and *Polkow* v *Citizens*

Insurance Company (Docket No. 87617) at such future session of the Court as all cases are ready for submission.

Persons or groups interested in determination of the questions may move the Court for permission to file briefs amicus curiæ.

(*Certification Omitted*)

ORDER

(State of Michigan — Supreme Court)
(Entered July 13, 1990)

(ROBERT POLKOW, d/b/a POLKOW OILING SERVICE, Plaintiff-Appellee, v CITIZENS INSURANCE COMPANY OF AMERICA, Defendant-Appellant — SC: 87617; COA: 108437; LC: 86-57197-CZ)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

On order of the Court, the application for leave to appeal, the motions of the Michigan Association of Insurance Companies and of the Michigan Farm Bureau and Farm Bureau Mutual Insurance Companies of Michigan for leave to file briefs amicus curiæ and the motion for admission *pro hac vice* are considered, and they are GRANTED.

We further ORDER that this case be argued and submitted to the Court together with the cases of *Protective National Insurance Company* v *City of Woodhaven* (Docket No. 85180) and *Upjohn Company* v *Allstate Insurance Company* (Docket No. 86906-8), at such

future session of the Court as all cases are ready for submission.

Persons or groups interested in determination of the questions may move the Court for permission to file briefs amicus curiæ.

(*Certification Omitted*)

ORDER

(State of Michigan — Supreme Court)
(Entered July 13, 1990)

(PROTECTIVE NATIONAL INSURANCE COMPANY OF OMAHA, Plaintiff-Appellant, v CITY OF WOODHAVEN, a Municipal Corporation, Defendant-Appellee, and RONALD L. VANN and LINDA VANN, individually, and RONALD L. VANN as Next Friend of RONALD A. VANN, MARK R. VANN and THOMAS A. VANN, Minors, Defendants — SC: 85180; COA: 101968; LC: 86-600321-CZ)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

On order of the Court, the motion for reconsideration of this Court's order of July 6, 1989 is considered, and it is GRANTED. We VACATE our order dated July 6, 1989 and we GRANT the application for leave to appeal.

We further ORDER that this case be argued and submitted to the Court together with the cases of *The Upjohn Company* v *New Hampshire Insurance Company and Allstate Insurance Company* (Docket Nos. 86906, 86907, 86908) and *Polkow* v *Citizens Insurance*

Company (Docket No. 87617) at such future session of the Court as all cases are ready for submission.

Persons or groups interested in determination of the questions may move the Court for permission to file briefs amicus curiæ.

(*Certification Omitted*)

(2)

Supreme Court, U.S.
FILED
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No. 90-289

In The

Supreme Court of the United States

October Term, 1990

F L AEROSPACE,

Petitioner,

-v-

AETNA CASUALTY & SURETY CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

VANDEVEER GARZIA
By: ROBERT D. BRIGNALL
Counsel of Record for Petitioner
CHARLES W. BROWNING
333 West Fort Street, Suite 1600
Detroit, Michigan 48226
(313) 961-4880

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

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QUESTIONS FOR REVIEW

I.

WHETHER THE FEDERAL APPELLATE COURT WAS BOUND BY THE *ERIE* DOCTRINE TO FOLLOW CERTAIN INTERMEDIATE STATE APPELLATE COURT DECISIONS, WHERE THE FEDERAL COURT DETERMINED THAT THESE DECISIONS IGNORE FIRMLY ESTABLISHED CONTRACT LAW PRINCIPLES SET FORTH BY THE STATE SUPREME COURT?

II.

WHETHER THIS COURT SHOULD ACT AS A REPOSITORY FOR DIVERSITY CASES IN WHICH PETITIONERS HOPE FOR A CHANGE IN STATE LAW FOLLOWING AN ADVERSE FEDERAL CIRCUIT COURT OPINION?

RULE 29.1 STATEMENT

Aetna Casualty & Surety Company is a wholly-owned subsidiary of Aetna Life & Casualty Company, a publicly-owned Connecticut corporation.

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No. 90-289

In The

Supreme Court of the United States

October Term, 1990

F L AEROSPACE,

Petitioner,

-v-

AETNA CASUALTY & SURETY CO.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Petitioner's statement is inexcusably slanted, and attempts to re-argue the late notice issue upon which Aetna prevailed in the District Court. That issue was not a subject of the Court of Appeals opinion and hence is irrelevant to this petition. Respondent believes this Court will be sufficiently guided by the recitation of facts that occurs in the opinion of the United States Court of Appeals in *F L Aerospace* v *Aetna Casualty & Surety Co.*, 897 F 2d 214 (CA 6, 1990).

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that this Court should deny the Petition for Writ of Certiorari for two reasons:

1) Neither of the issues raised by Petitioner fall within the criteria set forth in Rule 10, captioned *Considerations Governing Review on Certiorari.*

2) Neither of the issues has substantive merit.

POINT I

WHERE CERTAIN STATE INTERMEDIATE APPELLATE COURT DECISIONS HAVE INTERPRETED THE RELEVANT CONTRACTUAL PHRASE IN A MANNER THAT IGNORES BLACK LETTER DECISIONS OF THE STATE SUPREME COURT, THE *ERIE* DOCTRINE NOT ONLY PERMITS BUT COMMANDS THAT THE INTERMEDIATE APPELLATE COURT DECISIONS NOT BE FOLLOWED.

Under *Erie Railroad Co.* v *Tompkins*, 304 U.S. 64 (1938), a federal court has one primary role in diversity cases: to decide the case as would the state supreme court.

In fulfilling this obligation, a federal court must look first at the decisional law of the state's highest court in analogous cases and relevant dicta in related cases. *See Angelotta* v *American Broadcasting Corp.*, 820 F 2d 806, 807 (CA 6, 1987); *Bailey* v *V&O Press Co.*, 770 F 2d 601, 604 (CA 6, 1985). Where no direct authority exists from a state's highest court, the federal court must ascertain from all available data what the state's highest court would decide if faced with the issue. *Grantham & Mann, Inc.* v *American Safety Prods., Inc.*, 831 F 2d 596, 608 (CA 6, 1987).

Intermediate appellate decisions and state trial court decisions provide guidance only to the extent they reasonably predict how the state supreme court would decide an issue; "a federal court is not bound by lower court determinations if convinced by other data that the state's highest court would determine otherwise." *Bailey, supra* at 604. *Cf. Commissioner* v *Estate of Bosch*, 387 U.S. 456, 465 (1967) (intermediate state appellate decisions are "not controlling" in federal diversity cases); *King* v *Order of Travelers*, 333 U.S. 153 (1948) (same); *Itrich* v *Huron Cement Division*, 670 F Supp 199, 202-203 (ED Mich, 1987) (same).

Certainly, the Sixth Circuit in the instant case was not unmindful of the persuasive significance of intermediate court decisions. Indeed, it recognized that such decisions were not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *FL Aerospace* v *Aetna*, 897 F 2d 214, 218-219 (CA 6, 1990), citing *Woodruff* v *Tomlin*, 616 F 2d 924, 929 (CA 6, 1980). Thus, Petitioner is unable to meaningfully argue that the court below rejected either the *Erie* doctrine or its corrolaries; Petitioner is reduced to argue that the court below should not have been persuaded by other data that the Michigan Supreme Court would reject the intermediate appellate decisions championed by Petitioner and other waste generators. Such a contention does not implicate the certiorari jurisdiction of this Court under any of the criteria listed in Rule 10.

The court below recognized that to be faithful to *Erie*, it must reject Michigan intermediate appellate decisions if it believed that the Michigan Supreme Court would rule otherwise. *Dale Baker Oldsmobile, Inc.* v *Fiat Motors of N. Am., Inc.*, 794 F 2d 213, 218 (CA 6, 1986). *See, e.g., Borden, Inc.* v *Affiliated FM Insurance Co.*, 682 F Supp 927, 929 (SD Ohio, 1987) (previous intermediate appellate authority rejected because "the Ohio Supreme Court would not adopt the construction of the pollution exclusion set forth in [the prior case]"), aff'd, 865 F 2d 1267 (CA 6, 1989)[1]; *Ray Industries, Inc.* v *Liberty Mutual Insurance Co.*, 88-73445 (ED Mich, Dec. 1, 1989) (the Michigan Supreme Court would not follow *Polkow* v *Citizens Insurance Co. of America*, 180 Mich App 651; 447 NW 2d 853

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[1] Observe that in *Borden*, the waste generator filed a petition for certiorari to the Court of Appeals for the Sixth Circuit, raising precisely the same issue. This Court denied the petition, 110 S Ct 68 (1989).

(1990) because "*Polkow* rewrites the insurance contract by collapsing the definition of occurrence and the exception to the pollution exclusion, in effect removing the pollution exclusion"); *Fireman's Fund Insurance Co.* v *Ex-Cell-O Corp.*, 702 F Supp 1317, 1325 (ED Mich, 1988) (declining to follow *Jonesville Products Co., Inc.* v *Transamerica Insurance Group*, 156 Mich App 508; 402 NW 2d 46 (1986), because that decision "is unsupported by reasoning or authority, is contrary to the better reasoned, more recent decisions interpreting 'sudden and accidental', and is against the more reasonable interpretation of the word 'sudden'").

The other data that the Court of Appeals analyzed in this case consisted largely of Michigan Supreme Court rulings governing construction of contracts. The principles derived by the Court from these cases are unimpeachable, and deserve to be emphasized:

> "Michigan law is settled concerning the interpretation of provisions in insurance contracts. In Michigan, the rules for the construction of an insurance contract are the same as for any other written contract. *Hall* v *Equitable Life Assur. Soc'y*, 295 Mich 404; 295 NW 204 (1940). Any ambiguous terms must be construed against the insurer and in favor of the insured, because the insurer drafts the document. *Mays* v *Insurance Co. of N. Am.*, 407 Mich 165; 284 NW 2d 256 (1979). On the other hand, if the terms in the policy are not ambiguous, 'no construction, in the usual sense of the word, is called for'. *Schiff* v *Automobile Ins. Co.*, 290 Mich 457, 287 NW 920 (1939); *see also Indemnity Ins. Co. of N. Am.* v *Geist*, 270 Mich 510; 259 NW 143 (1935). When the words are free from ambiguity, 'the instrument is always to be construed accord-

> ing to the strict, plain, common meaning of the words themselves'. *Hall*, 295 Mich at 408; 295 NW at 206. Moreover, the plain meaning of words should not be perverted merely to benefit the insured party. *Wozniak* v *John Hancock Mut. Ins. Co.*, 288 Mich 612; 286 NW 99 (1939)." *FL Aerospace, supra*, p 219.

Having then found that the terms "sudden" and "accidental" were not ambiguous, and that the term "sudden" had a temporal meaning, the Court was led inexorably to the conclusion that the Michigan Supreme Court would reject any interpretation of the phrase "sudden and accidental" which lacked a temporal element. Compare *United States Fidelity and Guaranty Co.* v *Star Fire Coals, Inc.*, 856 F 2d 31, 34 (CA 6, 1988), wherein the phrase "sudden and accident" was similarly construed in a Kentucky diversity case, Kentucky contract law being virtually indistinguishable from that of Michigan.

Petitioner's Brief is oddly silent concerning the lower court's reliance upon contract law principles derived from Michigan Supreme Court decisions. Petitioner would have had the court examine other information which, according to Petitioner's argumentative agenda would have persuaded the court to go the other way.

First, Petitioner believes the Court of Appeals should have been compelled to examine certain unspecified "insurance industry documents" which allegedly gave clues to the insurance industry's own interpretation of the pollution exclusion clause. Yet, none of these documents were introduced into the record before the trial court, and they were not even referred to until after the Court of Appeals had made its decision. The Court of Appeals can properly consider only the record and facts considered in the District Court. FRAP 10(a); *Manning*

v *Lockhart*, 623 F 2d 536, 538 (CA 8, 1980). *See also* 9 Moore's Federal Practice (2d Ed), § 210.04 (1983), citing *United States* v *Mills*, 597 F 2d 693, 698 (CA 9, 1979) and *Commonwealth of Massachusetts* v *United States Veterans Administration*, 541 F 2d 119, 123 (CA 1, 1976). Thus, the Court of Appeals would have been barred from considering these documents, even if Petitioner's appellate counsel had attempted to refer to them in his appellate briefs or oral argument.

Petitioner also believes that the Sixth Circuit should have considered the definition of the term "accident" which appears in Chief Justice Dorothy Comstock Riley's opinion in *Allstate Ins. Co.* v *Freeman*, 432 Mich 656; 443 NW 2d 734 (1989). Petitioner correctly observes that the definition of that term contains no temporal element. This concept is hardly persuasive, and is in fact irrelevant, as it is the word "sudden" that injects the temporal meaning into the phrase "sudden and accidental." See *F L Aerospace, supra*, at 219-220. Other courts have recognized that the "sudden" element of the phrase "sudden and accidental" must be independently observed. *See, e.g., Star Fire Coals, Inc.*, supra; *Techalloy Co.* v *Reliance Ins. Co.*, 338 Pa Super 1; 487 A 2d 820 (1984); *Technicon Electronics Corp.* v *American Home Assurance Co.*, 74 NY 2d 66; 544 NYS 2d 531; 542 NE 2d 1048 (1989) ("Since the exception is expressed in the conjunctive, both requirements must be met for the exception to become operative. Stated conversely, discharges that are neither nonsudden or nonaccidental block the exception from nullifying the pollution exclusion").

Finally, Petitioner argues that the lower court should have taken into consideration "the plethora of case law in a number of states holding that 'sudden and accidental' are ambiguous terms." (Petition for Writ of Certiorari, p 12). Yet, there are plenty of foreign decisions

going the other way.[2] In fact, certain intermediate appellate decisions in the State of Michigan have begun to recognize that the phrase "sudden and accidental" is not ambiguous and does contain a temporal element. See *Protective National Ins. Co.* v *City of Woodhaven*, No. 101968 (Mich Ct App Sept. 28, 1988); *Chemetco, Inc.* v *Citizens Ins. Co.*, No. 109913 (Mich Ct App Feb. 13, 1990).

The *Erie* doctrine was respected by the lower court and there is no reason for issuance of a Writ of Certiorari.

POINT II

THIS COURT SHOULD NOT ACT AS A REPOSITORY FOR DIVERSITY CASES IN WHICH PETITIONERS HOPE FOR A CHANGE IN STATE LAW FOLLOWING AN ADVERSE FEDERAL CIRCUIT COURT OPINION.

Petitioner invokes the *Pullman* doctrine in an endeavor to obtain a Writ of Certiorari or some manner of stay order pending resolution of the consolidated pollution cases by the Michigan Supreme Court. Petitioner has misemployed the doctrine. Additionally, the relief Petitioner prays for would be inconsistent with sound judicial policy.

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[2] *Technicon Electronics Corp.* v *American Home Assurance Co.*, 74 NY 2d 66; 544 NYS 2d 531; 542 NE 2d 1048 (1989); *Techalloy Co.* v *Reliance Ins. Co.*, 338 Pa Super 1; 487 A 2d 820 (1984); *Centennial Ins. Co.* v *Lumberman's Mutual Casualty Co.*, 677 F Supp 342 (ED Pa, 1987); *International Minerals and Chemical Corp.* v *Liberty Mutual Ins. Co.*, 168 Ill App 3rd 361; 522 NE 2d 758 (1988); *American Motorists Ins. Co.* v *General Host Corp.*, 667 F Supp 1423 (D Kan, 1987); *Fischer & Porter Co.* v *Liberty Mutual Ins. Co.*, 656 F Supp 132 (ED Pa, 1986); *Waste Management of Carolinas, Inc.* v *Peerless Ins. Co.*, 315 NC 688; 340 SE 2d 374 (1986); *State* v *Amro Realty Corp.*, 697 F Supp 99 (ND NY, 1988); *Hayes* v *Maryland Casualty Co.*, 688 F Supp 1513 (ND Fla, 1988); *EAD Metallurgical, Inc.* v *Aetna Casualty & Surety Co.*, 701 F Supp 399 (WD NY, 1988).

Since this Court's decision in *Railroad Commission* v *Pullman Co.*, 312 U.S. 496 (1941), the following has been the policy of this Court:

> "[W]hen a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question. *Harris County Commissioner's Court* v *Moore*, 420 U.S. 77, 83 (1975)."

See also Moses H. Cone Hospital v *Mercury Construction Corp.*, 460 U.S. 1, 9 fn 7-8 (1982); *Orr* v *Orr*, 40 U.S. 268, 285-286 (1978) (*Stevens*, J. concurring). The *Pullman* doctrine is the source of the statement rudely extracted from its proper context by Petitioner that appears in the *Harris* case:

> "Where there is an action pending in State Court that will likely resolve the state-law questions underlying the federal claim, we have regularly ordered abstention." *Harris, supra*, p 83.

The "federal claim" referred to in the preceding statement is a *federal constitutional* claim. The lawsuit by F L Aerospace against Aetna sought to resolve questions of contractual interpretation, and did not involve questions of federal constitutional law at all.[3] This dispositive distinction should put this matter to rest. However, there is an irony in Petitioner's attempt to invoke the *Pullman* doctrine that merits comment. Since the *Pullman* doctrine is a doctrine of abstention, it has probably never before been raised by a petitioner. As with the 6th Circuit Court of Appeals, Petitioner asks this Court for affirmative relief, not for an abstention.

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[3] In fact, no federal question of any kind is presented.

Independently, the relief requested by Petitioner would, if granted, create poor judicial policy. This Court rarely grants any form of appellate relief in diversity cases. Yet, Petitioner desires this Court to grant certiorari, or enter some sort of order reserving its right to grant contingent future relief, because there are now pending in the Michigan Supreme Court cases which might generate state law inconsistent with that determined by the 6th Circuit Court of Appeals in this case.[4] Respondent is aware of no case wherein such relief has been granted by this Court, and Petitioner provides no sound reason for the granting of such relief.

At any given time, there are more than 50 cases pending before the Michigan Supreme Court for plenary review. As of June 29, 1990, there were 70 cases pending before that court. (1990 Michigan Appellate Digest). If the highest courts of all 50 states had a similar case load, there would be approximately 3,500 cases currently undergoing review before the highest state courts, any one of which could alter the extant common law. Suppose that for each such case there existed one case recently adjudicated on appeal by a federal circuit court involving issues being appealed to the state supreme court. If this Court accepted certiorari in this case based upon Petitioner's Issue II, or issued some manner of stay order, this *Aerospace* doctrine could generate at least 3,500 additional cases on this Court's docket, assuming this Court invoked the doctrine in every case where it could be applicable.[5]

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[4] *Upjohn Co.* v *New Hampshire Ins. Co.*, 178 Mich App 706; 444 NW 2d 813 (1989); *Protective National Ins. Co.* v *City of Woodhaven*, No. 101968 (Mich Ct App Sept. 28, 1988); *Polkow* v *Citizens Ins. Co. of America*, 180 Mich App 651 (1990).

[5] It would indeed be complicated to generate a rule limiting application of the *Aerospace* doctrine.

Moreover, for this Court to adopt a new doctrine concerning review of diversity cases, it would have to have a firm rationale. Petitioner offers no such rationale. Presumably, Petitioner would argue that there should be consistency in the adjudication of cases. Yet such a goal cannot be achieved by any remedial construct. Whenever state law is in the process of change, either through Supreme Court review or legislative action, litigants pressing their cases over the period of time before and after the change will encounter disparate results. Such a disparity in results over time is inherent in a judicial system in which intermediate appellate decisions may be reversed, and in which even within one level of appellate law making, the doctrine of *stare decisis* is not absolute.[6]

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

VANDEVEER GARZIA

By: /s/ ROBERT D. BRIGNALL
Counsel of Record for Petitioner

/s/ CHARLES W. BROWNING
333 West Fort Street, Suite 1600
Detroit, Michigan 48226 (313) 961-4880

Dated: September 4, 1990

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[6] Observe that the Michigan Supreme Court reversed itself on an issue of interpretation of state legislation, *Cassidy* v *McGovern*, 415 Mich 483; 330 NW 2d 22 (1982), supplanted by *Di Franco* v *Pickard*, 427 Mich 32; 398 NW 2d 896 (1986); or consider *Beauchamp* v *Dow Chemical Co.*, 427 Mich 1; 398 NW 2d 882 (1986) in which the Supreme Court's decision concerning MCL 418.131; MSA 17.237(131), was legislatively reversed by an amendment to that statute. 1987 P.A. No. 28, imd. eff. May 14.

SEP 14 1990

NO. 90-189

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

FL AEROSPACE,

Petitioner,

v.

AETNA CASUALTY & SURETY CO.,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE MID-AMERICA LEGAL FOUNDATION IN SUPPORT OF MOTION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Of Counsel:
ANDERSON KILL OLICK & OSHINSKY, P.C.
666 Third Avenue
New York, NY 10017
(212) 850-0700

MARTHA A. CHURCHILL
General Counsel
[Counsel of Record]
Mid-America Legal Foundation
20 North Wacker Drive
Suite 1721
Chicago, IL 60606
(312) 263-5163

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE OF MID-AMERICA LEGAL FOUNDATION

Pursuant to Rule 37.2 of this Court's Rules, Mid-America Legal Foundation, having been unable to obtain the consent of all the parties, moves for leave to file the attached brief Amicus Curiae in support of the petitioner for the following reasons:

1. The application by federal courts of state law in diversity cases is well-established.

2. The failure by a federal court to apply state law in a diversity case would undermine the foundations of the federal system.

3. Amicus Mid-America Legal Foundation is a non-profit corporation engaging in non-partisan legal research and representation in matters of public interest. Thus, Amicus Mid-America Legal Foundation presents an important, different and non-partisan perspective on the issue before this

Court, and Amicus Mid-America Legal Foundation respectfully submits that this motion for leave to file a brief amicus curiae should be granted.

Respectfully submitted,

/s/

MARTHA A. CHURCHILL
General Counsel
[Counsel of Record]
Mid-America Legal
Foundation
20 North Wacker Drive
Suite 1721
Chicago, IL 60606
(312) 263-5163
Attorney for Mid-America
Legal Foundation

Dated: September 13, 1990

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Protective National Insurance Co. v. City of Woodhaven, No. 101968 (Mich. Ct. App. Sept. 28, 1988), lv to appeal denied, 432 Mich. 929 (1989), denial vacated and lv to appeal granted, ___ Mich. App. ___ No. 85180 (July 13, 1990). 6

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INTEREST OF AMICUS CURIAE AND BACKGROUND OF THE CASE

Amicus Mid-America Legal Foundation respectfully urges that this Court grant certiorari in this case because the failure of a federal court to apply state law in a diversity case would be a serious blow to the federal system.

In the present case, the trial court properly held that, under Michigan law, Jonesville Products Inc. v. Transmerica Insurance Group, 156 Mich. App. 508, 402 N.W.2d 46 (1986), lv to appeal denied, 428 Mich. 897 (1987), an exclusion in an insurance policy that excepted discharges that were "sudden and accidental" did not apply if the discharges were "unexpected" and "unintended" from the standpoint of the insured.

On appeal, the Sixth Circuit found that, contrary to the published and unpublished opinions of the Michigan Court of Appeals, the Michigan Supreme Court would find "sudden and

accidental" to be unambiguous and have only a temporal meaning, that is, referring only to events of short duration. The failure of the Sixth Circuit to apply clearly articulated Michigan law in this case undermines the very foundation of the federal system.

CONSENT OF THE PARTIES

Although counsel to Aetna Casualty & Surety Company, Respondent, has refused to consent to the filing of this amicus brief, FL Aerospace, Petitioner, consents to Mid-America Legal Foundation's submission of this brief.

ARGUMENT

I.

THE FAILURE BY A FEDERAL COURT TO APPLY STATE LAW IN A DIVERSITY ACTION UNDERMINES THE FEDERAL SYSTEM

The issue presented in this case is of paramount importance to the effective and fair functioning of the federal system. The doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64

(1938) must be reaffirmed by this Court in order to clarify the limits inherent upon a federal court sitting in diversity. This Court should take this opportunity to reject the Sixth Circuit's failure to apply Michigan law under the guise of utilizing the principles of West v. AT&T Co., 311 U.S. 223 (1940).

Here, the highest court of the state, the Michigan Supreme Court, has not yet spoken on the meaning of the "sudden and accidental" language. However, opinions of the Michigan Court of Appeals, the Michigan intermediate appellate court, have held that "sudden and accidental" as used in the insurance policies mean "unexpected" and "unintended". Thus, there is Michigan law directly on point on this subject that the Sixth Circuit, under Erie, should have applied.

In reaching a result contrary to the opinions of the Michigan Court of Appeals, the Sixth Circuit also disregarded its own opinion in Wierczorek v. Volkswagenwerk, A.G., 731 F.2d 309

(6th Cir. 1984). In that case, the Sixth Circuit recognized that "[t]he law of Michigan is controlled by a decision of the Michigan Court of Appeals until the Michigan Supreme Court or another panel of the Michigan Court of Appeals rules otherwise." Id. at 310.

The Sixth Circuit, however, did not apply the Michigan Court of Appeals decisions. Instead, it reached a contrary result by utilizing "other persuasive data" referred to in West. However, even if "other persuasive data" properly were considered (which they should not be in view of clearly articulated Michigan law on this subject), they argue strongly for a result in line with the Michigan Court of Appeals decisions. Recently, the highest courts in two states have concluded that the "sudden and accidental" language should be given the same meaning as that given by the Michigan Court of Appeals. See Claussen v. Aetna Casualty & Surety Co., 676 F. Supp. 1571 (S.D. Ga. 1987), certified question to Sup. Ct. of Ga., 865 F.2d 1217 (11th

Cir. 1989), certified question answered, Claussen v. Aetna Casualty & Surety Co., 259 Ga. 333, 380 S.E.2d 686 (1989), 676 F. Supp. 1571, rev'd and remanded, 888 F.2d 747 (11th Cir. 1989); Just v. Land Reclamation, 155 Wis. 2d 737, 456 N.W.2d 570 (1990).

Here, both the directly applicable decisions of the Michigan Court of Appeals, as well as "other persuasive data," even if properly considered, require that the Sixth Circuit should have applied Michigan law as articulated by the Michigan intermediate appellate courts. This Court should take this opportunity to reaffirm that a federal court cannot substitute its own views contrary to state law under the guise of utilizing the "other persuasive data" analysis referred to in West.

At a minimum, this Court should abstain from ruling on the petition for certiorari until the Michigan Supreme Court has ruled on the meaning of the policy language. The Michigan Supreme Court has now agreed to hear the appeals

in three cases decided by the Michigan Court of Appeals that have held that the "sudden and accidental" language means "unexpected and unintended." These cases are Upjohn Co. v. New Hampshire Insurance Co., 178 Mich. App. 706, 444 N.W.2d 813 (1989), lv to appeal granted, _____ Mich. App. ___ Nos. 86906-86908 (July 13, 1970); Polkow v. Citizens Ins. of America, 180 Mich. App. 651, 447 N.W.2d 853 (1990), lv to appeal granted, ___ Mich. ___ No. 87617 (July 13, 1990); Protective National Ins. Co. v. City of Woodhaven, No. 101968 (Mich. Ct. App. Sept. 28, 1988), lv to appeal denied, 432 Mich. 929 (1989), denial vacated and lv to appeal granted, ____ Mich. App. ___ No. 85180 (July 13, 1990). Because the Michigan Supreme Court, which is the proper forum to interpret Michigan law, now has those cases before it, this Court should abstain from ruling on the petition.

CONCLUSION

For the foregoing reasons, Amicus Mid-America Legal Foundation respectfully prays that this Court grant the petition of FL Aerospace for a Writ of Certiorari to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Dated: September 13, 1990

Respectfully submitted,

MARTHA A. CHURCHILL
General Counsel
[Counsel of Record]
Mid-America Legal
Foundation
20 North Wacker Drive
Suite 1721
Chicago, IL 60606
Tele: (312) 263-5163
Attorney for Amicus
Curiae Mid-America
Legal Foundation

Of Counsel:
ANDERSON KILL OLICK &
OSHINSKY, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-0700